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JAMES H. McKENNE

In the

United States Supreme Court

AH HOW, *alias* LOUIE AH HOW,
Appellant,

vs.

THE UNITED STATES *et al.*, to and Including 313.

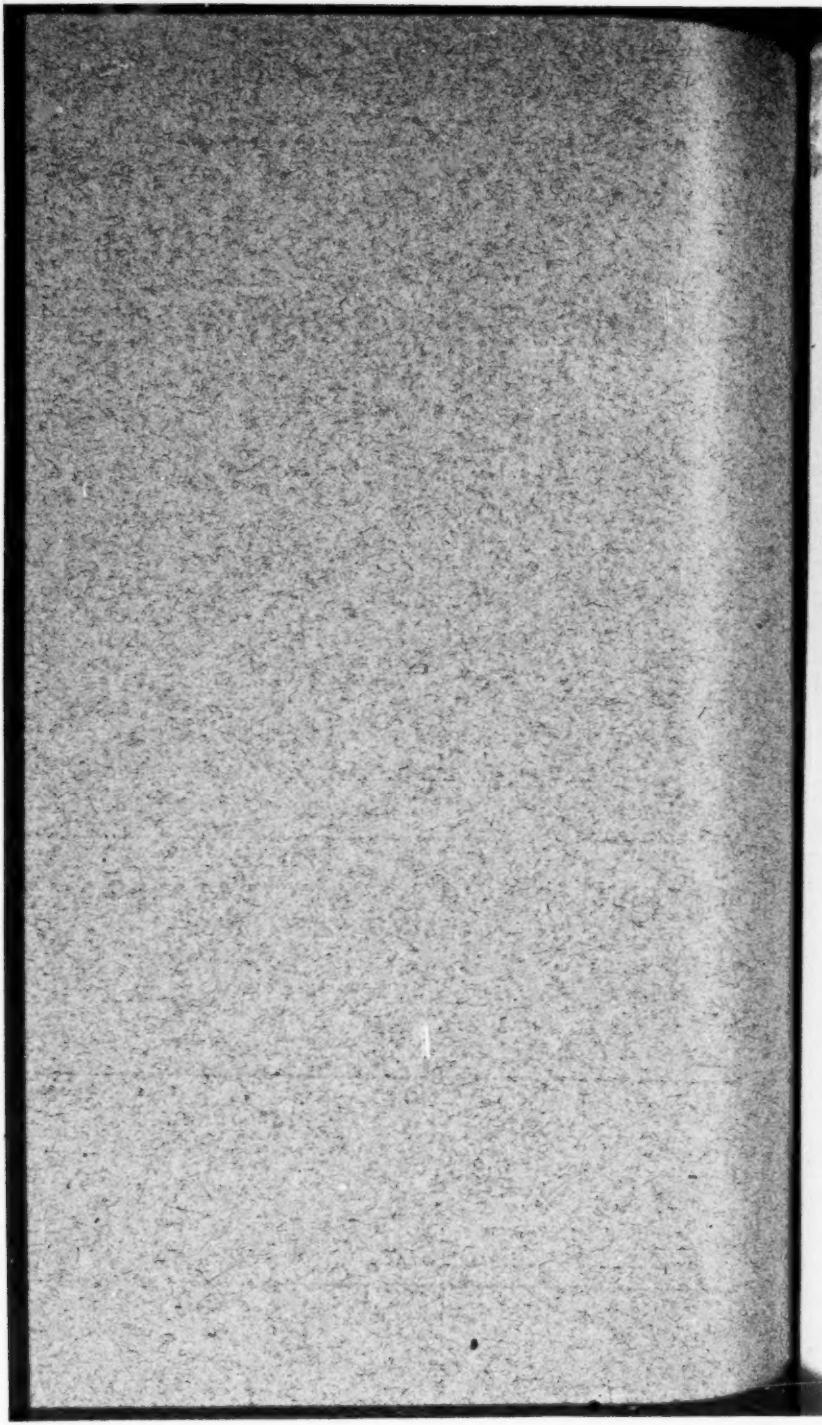
Nos. 307 to 313.

MOTION FOR LEAVE TO FILE ACCOMPANYING

BRIEF IN AID OF APPELLANTS ON BEHALF OF THE CHINESE CHARITABLE AND BENEVOLENT ASSOCIATION OF NEW YORK.

MAX J. KOHLER,
Of Counsel.

STILLMAN APPELLATE PRINTING CO., 26-28 Vesey Street



27239

In the Supreme Court of the United States,

OCTOBER TERM, 1903.

AH HOW, alias LOUIE AH HOW, Appellant, against UNITED STATES. *Et al.*, to and including 313.	Nos. 307 to 313.

Motion for leave to file brief in favor of Appellants on behalf of the Chinese Charitable and Benevolent Association, a New York corporation.

The Chinese Charitable and Benevolent Society, a corporation organized and incorporated under the laws of the State of New York in 1890, for charitable and benevolent purposes, and owning real estate within the City of New York, by Max J. Kohler, its counsel, presents this application for leave to file the annexed brief on motions to vacate orders admitting to bail and to dismiss and to affirm appeals,

AND REPRESENTS TO THE COURT:

First. That the cases brought up on appeal herein involve a number of serious and extremely

important questions affecting the rights of Chinese persons throughout the United States, including many members of your petitioning corporation.

Second. That the peculiar character of these Chinese Exclusion cases, involving arrests or exclusion of Chinese persons, frequently indigent, commonly far away from their home, and beyond the convenient reach of relatives and friends, as well as of witnesses in their own behalf, has made it desirable for the Chinese persons of the City of New York and its immediate vicinity, by concerted action and mutual aid, to assist each other in the defense of cases arising under the Chinese Exclusion Laws, and accordingly, at or about August 1st, 1903, your petitioning corporation did retain Mr. Max J. Kohler, of the New York bar, and duly admitted to practice before this Court, to defend Chinese persons arrested within or prevented from entering the United States, and residing in or about the vicinity of the City of New York, who are otherwise unprovided with counsel; said contract, however, expressly excepts and reserves from out of its operation, all cases of original entry into the United States of Chinese persons.

Third. That there are numerous cases pending, some involving members of your petitioning corporation, while others less directly, but all likely to be seriously affected by the determination of the important questions raised herein; and that for a further consideration of these questions and their importance, your petitioning corporation begs leave to refer to the accompanying proposed brief, which your petitioning corporation asks leave to submit in aid of the appellants herein.

A copy of these papers has been served on counsel for appellants and respondents, and counsel for

appellants has in writing consented to granting this motion for leave to file, and proposes in his brief to incorporate portions of this brief by reference.

WHEREFORE, your petitioning corporation prays that leave may be granted it to submit and file accompanying brief on said appeals.

And your petitioner will ever pray.

Signed, dated and executed by and on behalf of said Chinese Charitable and Benevolent Society, by direction of its Board of Directors.

November , 1903.

THE CHINESE CHARITABLE AND BENEVOLENT ASSOCIATION,
By,
MAX J. KOHLER,
Its Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

AH HOW, alias LOUIE AH HOW, Appellant, against UNITED STATES.	Nos. 307 to 313.
Et al. To and including No. 313.	

Brief in aid of Appellants, on behalf of the Chinese Charitable and Benevolent Association of New York.

These appeals raise important questions affecting the rights and liberties of hundreds of Chinese persons within the United States. They involve an attempt, certainly with respect to some of the questions arising, to change the established practice of the Government, to the detriment of Chinese residents of the United States, and it will be observed from the transcripts of record in each case that the proceedings are based wholly and solely on the registration provisions of the act of May 5th, 1892, as amended by the act of November 3d, 1893 (Section 6), which statutes have not directly been before this Court for consideration in any case since the Fong Yue Ting case (149 U. S., 698) was decided. All subsequent cases decided by this Court involved only cases of arrests on or almost

immediately after and in view of entry into the United States, which entry the Government attacked as unlawful.

The present case involves the rights of Chinese persons who are not even claimed to have entered the United States since many years, but the charge against them is that they neglected between the years 1892 and 1894 to register, though required to do so, on the theory that they were then, in those years, Chinese laborers, residing within the United States. As will be more fully argued hereinafter, by the clear language of the statute, only persons who were alien laborers within the United States in 1892 were required to register, and each of the cases here involved (except in No. 312, where sickness was shown as an excuse under the law), strong evidence was presented showing that these defendants were not of the class of persons required to register.

In spite of the efforts of the Solicitor General in his brief on the present motions to reduce each and all of these cases to determinations of mere controverted facts, *the fact is that in not a single case did the Government introduce testimony negativing the evidence offered by the Chinese appellants and their witnesses, and each case was decided on questions of law, the decision being challenged as incorrect on the law, and findings having been made in nearly all the cases in favor of these appellants, on the facts.*

Appeals were taken in each of these cases to this Court, because treaty and constitutional questions were involved, which had been raised both before the Commissioner and before the United States District Court for the Eastern District of New York.

These questions were different than were raised in this Court in the group of cases determined dur-

ing the October (1901) Term, in the cases of U. S. vs. Lee Yen Tai, 185 U. S., 213; U. S. vs. Chin Bak Ken, 186 U. S., 193; Lee Lung vs. Patterson, 186 U. S., 168.

Since those cases were before this Court, Congress passed the law known as the Act of April 29th, 1902 (32 St., p. 176), by which all prior laws concerning coming of Chinese persons to the United States, including certain specified sections of the Act of September 13, 1888, are:

> "hereby re-enacted, extended and continued so far *as the same are not inconsistent with treaty obligations* until otherwise provided by law."

This clause was introduced into the statute after the Hon. John W. Foster, as counsel for His Excellency, the Chinese Minister (as also others), had presented in some detail to the Senate Committee on Immigration, in the course of its investigation of our Chinese Exclusion Laws, a detailed statement in which it was contended that numerous provisions of existing laws and our statutes as a body, were violative of our treaty obligations with China.

The present appeals raise the question, involving the construction of the Treaty of 1894 with China, as to whether or not Article IV of the Treaty between the United States and China of 1894, granting to Chinese persons

> "for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens;"

has not superseded Section 3 of the act of May 5th, 1892, concerning burden of proof being on Chinese persons in Exclusion cases, as also the provisions

relied upon by the Government to justify attempted arrests otherwise than on complaint on oath within the purview of Article 4 of the amendments to the Constitution of the United States, reading

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue, but on probable cause supported by oath and describing the place to be searched or the persons or things to be seized."

It is further contended that the specific language of the Act of 1902 has had the effect of subordinating our legislation to this Treaty of 1894, has given the Treaty the force and effect of subsequent legislation, modifying and repealing the statutes in as far as inconsistent, and by affording Chinese persons the rights of the most favored nation for the protection of their persons and property, has repealed so much of our Chinese Exclusion procedure as has been based upon extra-constitutional methods heretofore valid, but inconsistent with the ordinary provisions of the Constitution of the United States, with which the statutes are now required to conform.

The Attorney-General of the United States in a very recent opinion, has recognized that the Act of 1902 has displaced certain prior provisions of our statutes concerning Chinese Exclusion cases. In the opinion of the Honorable Attorney-General, dated December 4, 1902 (24 Opinions, 544, at p. 545), he said:

> "There are other provisions of Section 7 of the Act of 1888, upon which this re-enactment and extension in the Act of 1902 may take effect, and *the later act expressly continued existing laws only so far as the same are not inconsistent with treaty obligations.*"

In addition to these treaty and constitutional questions, this Court has, of course, jurisdiction under the Circuit Court of Appeals Act to review all questions arising in the case, including those not dealing with such constitutional and treaty questions (Horner vs. U. S., 153 U. S., 570, 576; Chappel vs. U. S., 160 U. S., 499, 509; Chin Bak Kan vs. U. S., 186 U. S., 193, 201).

Besides the treaty and constitutional questions just considered, these cases also involve the following questions:

(*a*) The right to proceed against Chinese persons who were immature children when the Geary law was passed, requiring registration, on the theory that they were then "laborers" required to register under that law.

(*b*) The right to ignore a determination by the United States Commissioner, made after taking testimony and hearing both District Attorney and defense, to the effect that a Chinese defendant is a citizen of the United States by birth, when said certificate is introduced as the basis for the claim of *res adjudicata*.

(*c*) The authority to treat persons whom the Commissioner finds to have been "*engaged in business rather than manual labor*," in 1894, but "who do not show a real interest of each in the business *as partners*," as "laborers" required to register under the Geary law.

(*d*) The right to order the deportation of a Chinese laborer found by the Commissioner, by competent white testimony, to have been a resident of the United States at the time the Registration law was passed, and to have been sick during a portion of the period given to register by that law, on the mere theory that he might, during some portion of

the time given by the statute, have registered, and this notwithstanding the express exception incorporated in the Act of 1893 concerning such disability.

(*e*) The right to proceed under the present statutory enactments and treaty provisions upon such imperfect and inadequate complaints as are here involved in alleged non-registration cases.

(*f*) The right to institute these proceedings after the lapse of the period provided by the Statute of Limitations (Sec. 1047, Rev. St.), which, it is claimed, bars the proceeding.

(*g*) The right to bail pending appeals from the United States Commissioner, or higher appellate courts, in the cases of persons arrested within the United States in judicial proceedings, which question is brought up by the first branch of the Government's motions.

These separate questions will be presently considered *seriatim*.

Before entering, however, upon them it is proper, on behalf of appellants, to accept the invitation of the Solicitor General to go into some of the "history of the times" in connection with those cases, and ask the Court to take judicial notice of certain facts.

The Government makes some entirely unauthorized and unjustified attacks on Commissioner McGettrick's certificates, which will be presently considered, but in what we shall proceed to say, we shall avoid any such sweeping and unfounded generalizations, unfounded in fact, but will confine ourselves to some recent investigations made by officers of the Treasury Department of the United States in connection with these very cases, and upon which Government report, now on file in the

Treasury Department, Chinese Inspector Izard, who caused the present arrests, was removed after hearing, and his deputy, Jenkins, was transferred to the West.

While there have been many arrests from time to time in Chinese Exclusion cases, during the past five years, in cases of persons who were arrested on or upon view of entry, no wholesale arrests took place in this vicinity, until about a year ago, when Chinese Inspector Izard directed such proceedings in Boston, though he met with but little success there, because the Court (Lowell, J., writing) overruled his contentions on the law.

In re Chin Ark Wing, 115 F. R., 412.

Next followed wholesale arrests in Brooklyn, including these seven cases now here on appeal, the arrests taking place a day before the complaints were verified on July 29th, 1902.

Soon after, some twenty odd cases were instituted by these same officers, Jenkins and Izard, in the Southern District of New York, where, however, U. S. Commissioner Hitchcock discharged all the defendants, because he found that there had been a gross abuse of the process of the Court, in that Inspector Jenkins secured the warrant through false evidence under oath and made incorrect statements to the District Attorney, and himself, thus working a fraud upon the Court in obtaining these warrants. Investigations ordered at the instance of the Treasury Department into these New York and Brooklyn cases established the fact that these Inspectors had been instituting these proceedings in connection with attempts to force the sale of forged and bogus Commissioner's certificates of discharge to Chinese residents, and in pursuance of this scheme, caused the arrest of persons who

would not comply with these demands, and further, endeavored to bribe certain executive officials to aid in these nefarious schemes, and sought to intimidate United States Commissioners and other officers, in carrying out these purposes. Enough of these facts appeared in the public prints to make these matters part of the history of the times, which this Court may take judicial notice of. If the Court be not satisfied with such information, we submit that, on application to the Treasury Department, the detailed reports attesting all these facts, can be had.

So much for the effort on the part of the Government to dispose of these cases on unfounded charges as to fraud and bad faith, not appearing in the record. We, on the contrary, refer to these circumstances as showing to what demoralizing lengths these Chinese Exclusion cases can be carried, if the treaty and statutory safeguards restraining executive action in connection with them, be not given their requisite force and effect.

Before entering upon the consideration of the law propositions and the particular facts in each case presenting them, it is but proper to note the fact that in the case of Chu Do (No. 308), referred to on page 4 of the Solicitor General's brief, the statement that it was asserted that the father would be produced, "but finally the alternative 'uncle' appeared," simply ignores the fact (fol. 20) that the father of the appellant was taken sick on November 11th, 1902, and that on the adjourned day an affidavit from him was offered and an application made for an adjournment of the cause until he would be well enough to testify, and it is in view of this illness that defendant's 'uncle' instead of his father, was produced on November 21, 1902 (fol. 23).

Similarly as to the criticism concerning some

admissions made in the Tom Hung record (No. 310), page 9, the Solicitor-General ignores the fact, which explains the circumstance that the District Attorney and the defense conceded certain facts which two witnesses would testify to, for the reason that this defendant was one of several partners of the firm of Kwong Ten Ti & Co., to which the defendant, whose case had been tried just before, Tom Dock, (case No. 311), belonged, and that the two witnesses had been fully questioned as to such firm, when examined and cross-examined concerning such other defendant, just previously. In fact, instead of rejecting their testimony the Commissioner accepted their statements, as shown by his opinions and conclusion in his findings that these three persons were engaged "in business rather than in manual labor in 1894," but he decided against them, because he was of the erroneous belief that all non-merchants were "laborers," required to register.

The Government brief suggests that it is improbable that so many of these defendants, now laborers, should have been formerly merchants, or be exempt from registration on the plea of being citizens of the United States by birth.

Upon consideration of this claim, however, it becomes apparent that there is nothing improbable about it. On the contrary, the improbability arises from the contention that there should be so many alleged Chinese persons now in the United States who were laborers in 1892 and neglected to register within the months prescribed by the mandatory Act of 1893, called the "McCreary Law." The matter of registration involved little, if any, hardship; it was only the procedure for alleged non-registration which was harsh and oppressive.

After the Chinese residents had, generally, re-

frained from registering under the original Geary law, under advice of distinguished counsel to the effect that it was unconstitutional, the Government received the hearty co-operation of all Chinese officials throughout the United States in its efforts to have all Chinese laborers register within the extended period of six months running from November, 1893. Moreover, nearly ten years have elapsed since this statute was adopted, and it is wholly unreasonable to suppose that any considerable portion of Chinese persons who were laborers, residing within the United States in 1892, have all these years escaped the vigilance of the Government officials.

Examining the argument more closely, however, we find that there is nothing improbable, as claimed by the Government, either in the merchant's claim, nor in the citizenship claim.

Taking up, first, *the merchant's claim*, it is apparent, that, besides the usual changes of occupation incident among all classes of persons, the effect of the Chinese Exclusion Laws has been to reduce many merchants to the status of laborers, and largely stifled Chinese commerce in the United States.

As against the Government's assertions to the contrary, unsupported by evidence in this record, the Court may properly be asked to take judicial notice of the facts stated by Ho Yow, the Chinese Consul General at San Francisco, in an able article in the *North American Review* of September, 1901, in which, while pointing out the large number of deserted mercantile establishments found in recent years in San Francisco as compared to the situation prior to the Exclusion Laws commencing with 1882, he adds:

> "The gala days of San Francisco life and happiness were during the years that preceded

> 1880. The passage of the Exclusion Laws operated as a cone over a lighted candle. Chinese residents in California withdrew from industry, reduced their property to coin and with it returned to China, scrambling out of a country which they deemed inhospitable and unsafe. Business dried up. Trade with China which had been advancing at the rate of a million a year fell over seven million dollars in two years. It never revived until Dewey's victory. During the interim, San Francisco lost $200,000,000.00 of business in her trade with China alone."

It requires no argument to show how difficult it is for Chinese merchants returning to this country without great hardship and risk to establish the facts required by the Act of 1893, so that they, particularly, have been affected by our Exclusion Laws.

Concerning the *claim of citizenship* of Chinese persons because of birth within the United States, on the part of Chinese men claiming to be returning to the United States on reaching maturity, after a number of years of absence from the United States, Government official statistics as distinguished from rash, unscientific and unfounded assertion, lend, in the strongest way, support to this fact.

While the census shows that there were 105,465 Chinese persons in the United States in 1880 (75,132 in California), the census of 1900 show that there were then 106,000 in spite of all migration and natural increase, while by 1900 the number had fallen to 93,000. That the number included many women, particularly in California, has been repeatedly shown in the course of judicial proceedings.

Of course, children were born to them, particularly in California, who, under the Wong Kim Ark case (169 U. S.) are citizens of the United States.

The Government published a table of figures (Senate Executive Document No. 54 of the 52d Congress, 2d Session), prepared by the Collector of Customs of San Francisco, showing that at that port alone 32,090 more Chinese persons had departed from the United States from 1882 to 1891 than had arrived.

The right of return of numerous Chinese adults had been cut off by our Exclusion Laws. With respect to laborers, it was absolutely cut off by the Act of October 1st, 1888, and the Treaty of 1894 merely authorized registered laborers leaving thereafter to return to the United States under certain conditions. With respect to non-laborers, it would be impossible to compute the thousands that have been barred out by erroneous executive rulings, many hundreds being involved by the ruling set aside by this Court in the Lau Ow Bew case, in 144 U. S. Similar were the effects of the decision in the Gue Lim case in 176 U. S., 459. The result is, that many Chinese minors living with their parents were prevented from returning to the land of their birth because of their parents' inability to return, though when they became self-supporting, they were able to return themselves, and do so by advancing their claim of citizenship.

As to this claim of citizenship, the language of Judge WHEELER in U. S. vs. Yee Mun Sang, 93 F. R., 365, is directly in point and correct:

> "The testimony as to his place of birth is not preposterous and unnatural and cannot properly be rejected, although it cannot be contradicted if not true. It must be weighed as lawful evidence in any case must be. When so weighed it appears to prove the facts."

See, accordingly, U. S. vs. Jue Wy, 103 F. R., 795, and two recent determinations of the Circuit

Court of Appeals in the Ninth and Second Circuits, respectively, reported as U. S. vs. Lee Seick, 100 F. R., 398, and U. S. vs. Ham Toy, 120 F. R., 1022 (no opinion), both of which involve this question.

The opinion in the Lee Seick case is particularly important, because it refutes a claim so frequently made by the Government, frequently successfully, as in the cases involved on the present appeal, to the effect that the rule requiring testimony other than Chinese persons' concerning these questions is to be indefinitely extended beyond the statutory rule, so as to involve a rejection of all Chinese testimony on the unfounded theory that it is all incredible.

Some other remarks are made concerning the number of appeals in these cases taken to this Court, as indicating their frivolous character, and that they were taken simply for delay. This overlooks the fact that the Lee Yen Tai case came before this Court after a decision in favor of defendant by Judge Brown, on a certificate from the United States Circuit Court of Appeals for the Second Circuit; that with respect to the other cases in which the present counsel was interested, he specifically consented to the Government's motion to advance the three cases which were heard by this Court; they being advanced because it was deemed probable that their determination would decide the other cases. That these appeals can scarcely be regarded as frivolous would seem to appear from the fact that two justices of this Court dissented. Of course, as is elsewhere more fully indicated herein, the questions now involved are new and different questions than were raised on these other appeals.

POINT I.

These appeals are authorized by statute, and bail during their pendency is authorized and proper.

(1) *These appeals are duly authorized by law.*

That appeals from the determinations of United States Commissioners in Chinese Exclusion cases to the District Court are authorized, by Section 13 of the Act of 1888, was not only expressly conceded by the Government in this Court in the case of Chin Bak Kan vs. U. S., 186 U. S., 193, 201, but it was so held by this Court. Any doubt concerning the question which may have existed when the Chin Bak Kan case was decided, has been since removed by the express specific enactment or re-enactment of this Section 13 of the Act of September, 1888, in the Act of 1902, above considered.

The precise point was determined in the case of U. S. vs. Gee Lee, 50 F. R., 271 (C. C. A., 9th Circuit), and the practice has been widely followed since (see U. S. vs. Lee Seick, 100 F. R., C. C. A., 9th Circuit).

U. S. vs Pin Kwan, 100 F. R., 609 (2d Circuit).
U. S. vs. Ham Toy, 120 F. R., 1022.
Wong Wing vs. U. S., 163 U. S., 228, 269.
U. S. vs. Mrs. Gue Lim, 176 U. S., 459.

The case of Chow Loy vs. U. S., 112 F. R., 354 (Circuit Court of Appeals, 1st Circuit) was decided prior to the decision of this Court in Chin Bak Kan vs. U. S., and is directly inconsistent therewith, and the language therein quoted at pp. 558-9, from the case of Fong Yue Ting vs. U. S., 149 U. S., is the

very language invoked by present counsel in the Chin Bak Kan case in support of the view that the word "Judge" in Section 6 of the Act of 1892 and 1893—the registration provision—was to be construed in accordance with its literal terms and did not include "Commissioner" on the one hand, or "Court" on the other, but this very contention was overruled by this Court in Chin Bak Kan vs. U. S., at pages 199 to 202. With the knowledge that appeals were being entertained by the Circuit Courts of Appeals in the various circuits and by this Court from the decisions on appeal rendered by the United States District Court in Chinese Exclusion cases, Congress expressly and in terms enacted Section 13 of the Act of September 13, 1888, to remove any possible doubt upon the question and to safeguard the right of appeal. The contention of the Government, I submit, that there is no right of appeal from the District Court, is untenable.

The reason why these appeals have been brought direct to this Court, instead of taking the more frequent course of being carried to the Circuit Court of Appeals, is that they involve treaty and constitutional questions, as has already been noted, and this Court, accordingly, has authority to determine all the questions in the case under a long line of authority.

(2) *The right to bail, pending appeals, is sustained by the prevailing practice and is founded on authority, and prior efforts on the part of the Government to vacate orders for bail in such cases have failed.*

Before the Act of 1892 was passed, bail was freely allowed in these cases, being covered by statute and rules applicable, whether the cases be regarded as civil or criminal. If express statutory

authority for bail be needed, it is to be found in the General Provisions of R. S., 716, as to authority to issue all necessary writs and process, (Hudson vs. Parker, 156 U. S., 277), and the more specific provisions of R. S., Sec. 945, authorizing bail in civil cases, and Sections 1014 and 1015 and Rule 36 of the Rules of this Court applying to criminal cases.

In *habeas corpus* cases it is covered by specific special provision, R. S., 765, and rules of this Court (Rule No. 34). Moreover, the eighth amendment of the Constitution of the United States is general in its application, and provides that excessive bail shall not be required. Accordingly in Chinese Exclusion cases, right to bail pending hearings was freely exercised before the Acts of 1892 and 1893 were pased.

> Case of Unused Tag, 21 F. R., 701, 706.
> *In re* Chow Goo Pooi, 25 F. R., 77 (Sawyer, Hoffman, Sabin, JJ.)
> Case of Chinese Wife, 21 F. R., 808, 810.

The general rule, even as applied to criminal cases, is laid down by this Court in Hudson vs. Parker, 156 U. S., 277, 285, as follows:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

The provisions in the Acts of 1892 and 1893, to be presently further considered, have no application to this case, and the right to bail has been freely exercised since their enactment. The right

was specifically recognized by Judge Addison Brown in the United States District Court for the Southern District of New York on May 3rd, 1901, in the unreported case of U. S. vs. Du Shen Tau, *et al.*, reading as follows:

> "Upon an allowance of appeal in the above matter the Court directed that the Chinamen be admitted to bail in the sum of $500 each, and a motion has been made on the part of the Government to vacate the allowance of bail on the ground that by Section 2 of the Act of November 3d, 1893, 28 Stat. at L., p. 7, it is provided:
>
> 'That pending the execution of the order of deportation such Chinese persons * * * shall not be admitted to bail.'
>
> The uniform practice in many cases in this District since the passage of the Act of 1893, has been to admit to bail during the pendency of an appeal. Most of the Judges of this circuit have made such orders, as I have done frequently. The provision above referred to has not been supposed to affect the authority of the Court or the ordinary practice of the Court during appeals, to admit to bail, and so far as I know, this right has not been previously questioned. I am informed by counsel that the question is now pending before the Circuit Court of Appeals in this District. I have examined with some care the brief submitted by the defendants, and am of the opinion that there is reasonable question whether the above provision of the Act of 1893 was designed to affect or does in fact affect the right to admit to bail pending an appeal. Considering that the question is now pending in the Court of Appeals, and probably will be shortly determined, and in view of the general practice previously to admit to bail, I think it is better to adhere to that practice until the decision is made by the Court of Appeals."

Mr. Justice PECKHAM in the group of cases reported as Chin Bak Kan vs. U. S., with knowledge of the controversy and after examining Judge BROWN'S opinion, concluded to follow it, and allowed bail.

At the time the opinion of Judge Brown was handed down, there were pending two cases in the Circuit Court of Appeals for the Second Circuit, in which the Government moved to vacate orders for bail, but the applications were denied in each case, though on technical grounds.

U. S. vs. Lee Yen Tai, 108 F. R., 950.
U. S. vs. Moy Yee Tai, 109 F. R., 1.

Subsequent to this, the Government made motions to vacate Mr. Justice PECKHAM'S order for bail in the cases of Chin Bak Ken and Chin Ying vs. U. S., 186 U. S., but this Court did not determine those motions.

Since then bail has been allowed in various cases, to the personal knowledge of counsel, by Mr. Justice PECKHAM, Judge WHEELER and Judge THOMAS.

Two provisions are referred to as limiting the power to bail, Section 5 of the Act of 1892 (2 Supp. R. S., 13) and Section 2 of the Act of November 3d, 1893 (2 Supp. R. S., 154).

(3) *The prohibition of Section 5 of the Act of 1892 upon bail on habeas corpus cases applies only to cases where entry to the United States is sought to be had by means of a writ of habeas, and by its terms has no application to a case where, like here, arrest took place within the United States.*

This section is involved in the case of *In re* Chin Yuen Sing, 65 F. R., 788, in which Judge Lacombe held, with respect to a case where entry was sought

into the United States through a writ of *habeas corpus, without even awaiting a determination by executive officials*, that as he was prohibited from taking bail before the appeal, his discretion ought not to be exercised in favor of bail upon appeal. In fact, however, Judge Lacombe subsequently in that very case allowed bail on the appeal to this Court, determining the question of power in favor of the exercise thereof, as well as that of discretion, though the appeal was subsequently dismissed.

Chin Yuen Sing vs. Kilbreth, 163 U. S., 680.

This view is in line with that taken by this Court in Hudson vs. Parker, *supra*, and in the Wong Kim Ark case, 169 U. S., 659, where, under similar conditions, bail was taken.

It is submitted, first, that this statute refers only to cases in which application is made for entry into the country through *habeas corpus, in the first instance*, and in advance of the decision by the Immigration officials, whose determinations were made binding upon the Courts only in the subsequent act of 1894; and, second, that this statute has no applicability to appeals concerning which, in *habeas* cases, the statute and the rules already considered had made ample provision. In either event, however, this statute has no application to the present case, in which defendants were arrested long after they had been peacefully residing within the United States, and they are not seeking entry into the United States through a writ of habeas corpus.

(4) *The provision in Section 2 of the Act of 1893 has no application to this case, inasmuch as this is an appeal.*

This statute relied upon by the Government and printed in its brief herein reads as follows, it being found in the second subdivision of Section 6 as amended by the Act of November 3d, 1893:

> "Such order of deportation shall be executed by the United States Marshal of the district within which such order is made and he shall execute the same with all convenient dispatch; *and pending the execution of such order* such Chinese person shall remain in the custody of the United States Marshal and shall not be admitted to bail."

It would be difficult to find any language less apt to express an intention to forbid bail pending appeal than the language relied upon here by the Government "*pending the execution of such order.*"

The Attorney General, in an opinion reported as 22 Opinions, 340, points out that even if appeals do not vacate entirely the orders for deportation—particularly in cases where the District Court on appeal may conduct a new trial *de novo*,

> U. S. vs. Lee Seick, 100 F. R., 398 (C. C. A., Mr. Justice McKenna, sitting).—

they, at any rate, *suspend* the orders, so that the language, "pending the execution of such order," is not an apt reference to appeals. In fact, however, it is clear that no such purpose was in the mind of Congress in enacting this statute, as to curtail the right to bail on appeal. The fact is that so many thousands of Chinese laborers in the United States, under advice of distinguished counsel, neglected to register under the Geary Law of 1892, believing it to be unconstitutional, that an enormous number of persons were liable to be deported, and there were no adequate funds for executing such orders. Accord-

ingly, Judge LACOMBE, on May 26th, 1893, directed a discharge of Chinese persons whose deportation had been ordered in proceedings not appealed from, they to be re-taken after departmental authority to execute the order was confirmed.

In re Ny Look, 56 F. R., 81.

This practice was in line with the California federal precedents in *habeas corpus* cases already considered.

See Treasury Department action accordingly, Treas., Dec., No. 13996.

The Attorney General joined in this solution of the problems and requested United States Attorneys to ask their judges to make similar orders, which was done everywhere except in one California case.

Congressional Record, 53rd Congress, Vol. 25, Part II, p. 2,444.
U. S. vs. Chum Shang Yuen, 57 F. R., 588.

When Chinese legislation was being considered by Congress at the session at which the Act of 1893 was passed, it called on the Attorney General for the correspondence relative to this decision of Judge Lacombe's, which was furnished on September 23rd, 1893. It was to meet this situation that Congress passed this provision of the Act of November 23rd, 1893, requiring detention in custody and forbidding bail.

Appeals were not under consideration, but only this practice of *discharging and bailing after final unreviewed orders of deportation.* The language of the Act expresses such intention, and is not applicable to appeals.

The General Statutes and rules as to bail on appeal, already referred to hereinbefore, govern bail

pending appeals, and this Act of 1893 nowhere even refers to appeals, does not attempt to deal with that subject nor the disposition of Chinese persons pending appeals, and does not modify the existing system relative to that matter.

The well-settled principle applies that special statutes like those as to appeals are not modified or repealed by subsequent General Statutes, in the absence of language unmistakably indicating that the subject matter of the special statute was within legislative contemplation, as held in *ex parte* Crow Dog, 109 U. S., 556.

Moreover, the construction contended for by the Government would be imputing intention to work gross hardship to Congress, in the matter of requiring imprisonment pending appeals, bound to take up some time, quite inconsistent with its subordination of these statutes by the Act of 1902, to Article 4 of the Treaty of 1894, conferring upon Chinese persons for the protection of their persons and property all the rights of the most favored nation, and besides would be of more than doubtful constitutionality as involving imprisonment as distinguished from mere brief detention, incidental to deportation.

Yick Wo vs. Hopkins, 118 U. S., 356, 368-9.
In re Qwong Wo, 13 F. R., 229, 233; Field, J.
In re Ah Chong, 2 F. R., 733, 737-9.
In re Parrot, 1 F. R., 481, 483, 498.
Wong Wing vs. U. S., 163 U. S., 228.
U. S. vs. Wong Dep Ken, 57 F. R., 206.
In re Lintner, 57 F. R., 587.

(5) *The statute is moreover, by its own terms, limited to "such" orders of deportation.*

When we examine the prior portion of the

statute for the antecedent of the word "such," we find it in the first subdivision of the amended Section 6 of the Act of 1893, concerning order for deportation in non-registration cases.

Under the principle of U. S. vs. Gooding, 12 Wheaton, 460, 477, the act is thus limited, and this was the point under consideration of Congress with respect to enforcement of *unappealed* orders for deportation for non-registration. Moreover, the word "such" in the passage of the statute concerning bail invoked by the Government, corresponds with the language found in the first subdivision of the amended Section 6, reading as follows.

> "be deported from the United States, *as provided in this Act*, and in the Act of which this is an amendment,"

thus referring in deportation cases for non-registering, not only to the provision of the Act of 1892, as to the *country* of deportation, but to the very provision on this subject of deportation here invoked in the Act of 1893. The only provision in the Act of 1893 as to *method* of deportation is this custody and bail provision, which is thus incorporated by express reference into the non-registration provision.

It is submitted that the Act of 1893 in question was not intended, and does not curtail the right to bail pending appeals, and that the language used is not apt to carry out such alleged intention, and that the right to bail continues as prior to said statute, with respect to appeals.

(6) The Government refers to the case of

> Chan Gun vs. U. S., 9 App. Dist. C., 290,

as an authority against the right to bail. In that case, the Court of Appeals of the District of

Columbia did have the question before it (pp. 304–5), in 1896, whether the order for bail pending appeal in a non-registration case, was valid or not, and held that the lower Court erred in admitting to bail. Appellant's counsel did not oppose this contention at all (see his brief, pp. 294–6), none of the arguments herein made and considered were before the appellate court; nor was the Treaty of 1894 anywhere called to the attention of the Court, nor the Act of 1902, nor a single case herein referred to. That case deals only with bail in non-registration cases, but even as applied to these, it is submitted, it is contrary to principle and authority.

POINT II.

The Statutes relied upon by the Government to throw the burden of proof on Chinese defendants (Sec. 3 of the Act of 1892), those alleged to allow arrest otherwise than upon a warrant upon complaints under oath, as distinguished from mere suspicion or even absence of suspicion, and the Acts relied upon as denying bail, are inconsistent with Article IV. of the Treaty with China of 1894, conferring on Chinese persons for the protection of their persons and property all the rights of the most favored nation, particularly by force of Section 1 of the Act of April 29, 1902 (32 St., 176), continuing the statutes only in as far as not inconsistent with Treaty, and are inconsistent with the Constitutional Amendments of the Federal Constitution, to which these Statutes have been subordinated by said Treaty and Act of 1902.

This Court, in several recent cases, while holding that certain of the provisions of the Chinese Exclusion Statutes were inconsistent with Treaty, applied the well settled principle that a later inconsistent statute supersedes an earlier treaty,

> The Chinese Exclusion Cases, 130 U. S., 598,

and said that arguments as to the oppressiveness

of these statutes must be addressed to Congress, not the Courts.

Li Sing vs. U. S., 180 U. S., 486 at 495.

The Treaty of 1894 concededly repealed some provisions of the earlier statutes, such as in any event the Act of October 1st, 1888, forbidding the return under any conditions of Chinese laborers. (21 Opinions, 68), and the place from which certificates were to be secured (21 Op., 347), and provisions as to certificates of disability (23 Op., 545).

Various other provisions were being challenged by China and Chinese persons as unconstitutional, including, among others, two provisions (Sections 6 and 12 of the Act of 1884), which were under consideration by this Court when this Act of April 29th, 1902, was passed. Congress, recognizing that various inconsistencies may have existed, and influenced by the observations of this Court that relief could be had only from Congress, by unmistakable language evinced its desire to keep treaty faith, and to give the Treaty the force of a later enactment, rather than one that might be regarded as superseded by these later Acts. That its action by its use of these suggestive words has had some such effect, is recognized by the opinion of the Attorney-General already quoted (24 Opinions, 544, at 545).

The claim now made by the Government that the contentions herein made were overruled in the cases of Lee Yen Tai vs. U. S., 185 U. S., 213, 222, Chin Bak Kan and Chin Ying vs. U. S., 186 U. S., 193, 200, and Lee Lung vs. Patterson, 186 U. S., 168, 176-7, is clearly fallacious, as will be noticed by an examination of these cases. They involved only the alleged repeal of Sections 6 and 12 of the Act of 1884 by said Treaty. None of the other questions had been presented below as Treaty

questions, and they were not open in this Court and were not argued here, especially as defendant there, without objection, had assumed the burden of proof. It is true that the Chin Bak Kan case (186 U. S., 193), did involve an attack on the burden of proof provision, but that was based on the claim that it was unconstitutional as applied to the determination of the citizenship issue. Moreover, as already pointed out, the Act of 1902 is a new and most important factor, evidencing and effecting a partial repeal of earlier statutes by subordination to treaty.

This Court and the lower Federal Courts have repeatedly given force and effect to such provisions as Article IV of the Treaty with China of 1894, as invalidating statutes and proceedings devoid of ordinary due process of law.

Yick Wo vs. Hopkins, 118 U. S., 356, 368-9.

In re Quong Woo, 13 F. R., 229, 233, FIELD, J.

In re Ah Chong, 2 F. R., 733, 737-9.

In re Parrott, 1 F. R., 481, 483, 498.

Wong Wing vs. U. S., 163 U. S., 223.

In re Lintner, 57 F. R., 587.

Mrs. Gue Lim vs. U. S., 176 U. S., 459, 465.

POINT III.

The Registration Provisions of the Chinese Exclusion Laws (Section 6 of the Act of Nov. 3rd, 1893, superseding Section 6 of the Act of 1892) have been erroneously construed below as having required all persons not now proved to be merchants as defined in the Act, to register as "laborers," as also persons who were minors, residing in the United States in 1892 having no occupation of their own, contrary to a reasonable construction and understanding of these laws, at least as given during the six months following November 3rd, 1893, during which alone registration was permitted.

Of the seven cases here involved, the defendants in Nos. 311 (Tom Dock), 310 (Tom Hong), 313 (Lee Kit) and Ah How (307), defended on the ground that they were non-laborers resident within the United States from 1892 to 1894, and tried to show that they were merchants. I am preserving the order in which they were tried, ignoring for the present No. 308 (Chu Do), whose case was first tried, involving a claim to American Citizenship and No. 309, a man of 26 (Lew Guey), the second tried, now only 20 years old and holding a genuine Commissioner's certificate, evidencing a decision in his favor in 1897, on his claim to American Citizenship, as also No. 312 (Yung Lee), the last of the series to be tried, who defended on the ground that he was too ill to register, and is now entitled to a certificate under the express terms of the statute; Cases Nos. 311, 310, 313 and 307 were tried in that order, after the second case, No. 309, had been tried.

The Alleged Merchant Cases.

In the first three of these alleged merchant cases, the U. S. Commissioner made findings which show precisely what he decided, and absolutely negative the Government's assertion that these cases were decided on any rejection of defendant's or defendant's witnesses' testimony on the facts, and shows that they raise pure questions of law which this Court is now asked to review. Each of the records in Nos. 311, 310 and 313 contains this opinion, which may be found in No. 311, the Tom Dock case, at folios 77-8, and reads as follows:

> "In these three cases it is urged on one side that the decision of the Circuit Court of Appeals of this circuit in the case of the United States vs. Pin Kwan requires the Commissioner to decide that these three Chinese persons were not merchants within the meaning of the statute in 1894, and that being now laborers without certificate of residence they must be deported. On the other side it is urged that the decision of the Court in that case was only that the merchant's certificate that Pin Kwan had was not the certificate required by law and could not be effective to allow his remaining here, and that the discussion of the effect and weight of evidence which the Court itself had said it was error to admit, (a certificate being the sole proof admissible), goes merely to show what the Court thought of the evidence in that case which differed from the present one. Admitting the distinction, I do not think the United States Commissioner is at liberty to disregard carefully expressed language of the Circuit Court of Appeals for the circuit, even though a dictum of the court as to the precise question before it. The *proofs furnished in this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894*, but not to show a

real interest of each in the business as partners; they do not, to my mind, clearly establish facts which would bring these persons within the statute as merchants. It follows that an order for deportation for each one must be made."

It will be observed that the Commissioner felt constrained to follow the opinion of the Circuit Court of Appeals for the Second Circuit in the case of U. S. vs. Pin Kwan, 100 Fed. Rep., 609, reversing 94 F. R., 824 (Coxe, J.), and he overlooked the distinction between the statutes applicable to entry cases and those governing the registration of laborers, thus assuming that all non-merchants resident in the United States in 1892 were required to register, and of course could not give effect to the circumstance that this Court had previously given expression to its doubts as to the correctness of this Pin Kwan decision, even as applied to entry cases, by granting applications to certiorari that cause (178 U. S., 611), though defendant's indigence in that case led to a dismissal of the cause without decision for non-perfecting of said appeals (U. S. Sup. Ct. Rep., [illegible] 45, Lawyers' Ed., p. 1255).

In Case No. 307 (the Ah How case), the fourth of these alleged merchant cases to be tried, the Commissioner made no findings and wrote no opinion, the questions being the same as in the three just tried, in which his findings have just been considered.

Of course, each of these cases involves only a non-registration charge (see complaint in No. 311, fol. 1, identical with the rest), and each of the defendants is shown to have been continuously a resident of the United States over five years (see *post*, Point VII), all but one continuously for over 20 years, and they were arrested while peace-

ably here, without being even charged with unlawful entry.

The Statute here involved is the Act of Nov. 3rd, 1893, reading as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section six of an act entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May fifth, eighteen hundred and ninety-two, is hereby amended so as to read as follows:
>
> "SEC. 6. And it *shall be the duty of all Chinese laborers within the limits of the United States* who are entitled to remain in the United States before the passage of the act to which this is an amendment, to apply to the collector of internal revenue of their respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail or refuse to comply with the provisions of this act and the act to which this is an amendment, or who, after the expiration of said six months shall be found within the jurisdiction of the United States without such certificate of residence, **shall** be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States Customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as provided in this act and in the act to which this is an amendment, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of said United States Judge, and by at least one credible witness, other than Chi-

nese, that he was a resident of the United States on the fifth day of May, eighteen hundred and ninety-two; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost.

Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the Court; and any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply and receive the same without charge; and that no proceedings for a violation of the provisions of said section six of said act of May fifth, eighteen hundred and ninety-two, as originally enacted, shall hereafter be instituted, and that all proceedings for said violation now pending are hereby discontinued:

Provided, That no Chinese person heretofore convicted in any court of the States or Territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in said act and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted.

Sec. 2. The words '*laborer*' *or* '*laborers*,' wherever used in this act, or in the act to which this is an amendment, *shall be construed to mean both skilled and unskilled manual laborers*, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: *A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.*

Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year was not engaged in the performance of any manual labor, except as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing.

Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch, and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal and shall not be admitted to bail.

The certificate herein provided for shall contain the photograph of the applicant, together with his name, local residence and occupation and a copy of such certificate, with a duplicate of such photograph attached, shall be filed in the office of the United States collector of internal revenue of the district in which such Chinaman makes application.

Such photograph in duplicate shall be furnished by each applicant in such form as may be prescribed by the Secretary of the Treasury.

Approved November 3d, 1893."

In considering this question in the Pin Kwan case (100 F. R., 609, 610), the Court, by LACOMBE, J., after holding that defendant, an accountant, who had a certificate so reciting under Section 6 of the Act of 1884, but who tried by evidence outside of the exclusive statutory certificate to show that he was a merchant, after being arrested, in view of entry into the United States, held that, even if the certificate did suffice, which the Court denied—the Government might rebut its recitals, and had done so in this case. The Court says as to defendant's own testimony (page 612):

> "He further testified that since his arrival Pin Kwan has lived at the stores of the company, 'attends to the business, keeps the books, and sells goods,' and that 'he has an interest in the stock of goods, and has had ever since he came here.' But what that interest is does not appear. This does not bring him within the definition of a merchant prescribed by the statute. There is nothing to show that he is engaged in both buying and selling and certainly the business is not conducted in his name. The Circuit Court of Appeals in the Ninth Circuit has held that the statute is to be so construed as to eliminate the clause expressly inserted by Congress, 'which business is conducted in his own name,' whenever the interest of the merchant is 'real, and appears in the business and partnership articles in his own name.' Without now expressing an opinion as to the soundness of so much of that decision as applies the doctrine laid down in Church of Holy Trinity vs. U. S., 143 U. S., 457; 12 Sup. Ct., 511; 36 L. Ed., 226, to expunge from a statute words seemingly inserted with careful intention, it is sufficient to say that there is not a scintilla of evidence in the case at bar to show that Pin Kwan has an interest in the Quong Sing Lung Company which is real and

> appears in the business and partnership articles in his own name. The defendant, so far as the proof shows, is in fact but a clerk and bookkeeper, or assistant accountant, in the employ of the company, who sometimes sells its goods and keeps its books. He is not a merchant, but a skilled manual laborer, and as such liable to deportation."

It will be observed that Commissioner Benedict's reference in these cases to a failure to show a "real" interest as co-partner by the firm books and articles is an allusion to the language in this Pin Kwan case, because here also the firm books and articles of this long-dissolved firm were not produced, having been carried away years before the trial by one of the former partners, though it is shown that their names did appear in these partnership articles (No. 311, fols. 17, 18, 40, 45, 46). The other records are similar.

But this Pin Kwan case dealt only with alleged unlawful entry into the United States, being directly concerned with the provisions of Section 6 of the Act of 1894 as to certificates from non-laborers on entry. Under the prevailing view, many persons are excluded from entry without the appropriate certificates, even though they be merchants, while *various classes* of non-laborers are not *entitled to enter*, no matter what certificate they have (Treas. Dec. No. 21600, as to preachers, physicians, etc., and other persons not enumerated in Article III of the Treaty of 1894, and this Pin Kwan decision as to "accountants," compare doubt as to the soundness of this view, in U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 463). The treaty of 1894 *prohibits* immigration of Chinese laborers only (Article I), the third article as to privileged classes not necessarily being an exclusive enumeration, and the principle being well settled that only the prohibition of migration

of laborers is aimed at. (Lan Ow Bew vs. U. S., 144 U. S., 47, 59; U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 467). Obviously, therefore, a person who is excluded from entering is not necessarily a laborer, while only manual "laborers," as defined in the Act of 1893, were required to register. It is accordingly a *non-sequitur* to regard the classes of persons forbidden from entering as the same classes who, as manual "laborers" were required to register. Even if mercantile status, as defined in the statute, be not established, the person is not thereby shown to be a "laborer" required to register. Besides, the provision as to proof of mercantile status by white witnesses applies only to applications for re-entry into the United States on that ground (Li Sing vs. U. S., 180 U. S., 486; U. S. vs. Lee Seick, 100 F. R., 398, C. C. A.).

No other persons have been required to register other than such as were both (*a*) Chinese laborers, and (*b*) resident within the United States in 1892, nor could any person register at any time after six months after November 3d, 1893. (Fong Yue Ting vs. U. S., 149 U. S., 698, 726, *et seq.*; U. S. vs. Sing Lee, 71 F. R., 686; U. S. vs. Tyle, 70 Fed. Rep., 318; *In re* Chin Ark Wing, 115 F. R., 412, Lowell, J.; See Rulings of the Treasury Department itself to that effect, made in December 1897, and published as Treasury Decisions 18666, 18686; compare Art. IV of the Treaty of 1894.)

When Chinese laborers resident in the United States in 1892 were called upon to register by the Act of 1893, regulations to enforce the law were duly promulgated by the Commissioner of Internal Revenue and the Secretary of the Treasury on November 25th, 1893 (Treasury Dec. No. 14542 1-2), which required the laborer to state his occupation in his written application for registration, as also

the witness he produces, and this was also to be stated in the certificate. These regulations provided:

> "The persons referred to in the Acts of Congress to which these regulations apply, and whose immigration into the United States is prohibited, *are limited to Chinese laborers*."

Numerous cases have arisen from time to time in which the courts have given effect to the fact that the Act of 1893 defines both the terms "merchants" and "laborers," and does not state that a non-merchant is to be regarded as a laborer.

In U. S. vs. Mark Ying, 76 F. R., 450, Judge Wheeler, in dealing with a case of a peddler, properly says:

> "The Act of 1893 also defines merchants, and he (defendant), is said not to be a merchant within the definition. But the Act does not declare all not merchants to be laborers, nor otherwise require registration of them. The question is not whether the respondent is a merchant, and so exempt from registration, but whether he is a laborer and so liable to deportation for want of registration. He does not appear to be a laborer within either common understanding or the statutory definition of the term."

In U. S. vs. Chin Fee, 94 F. R., 828, at p. 829, the same judge held that a physician resident here in 1892 was not a laborer required to register as such.

In *In re* Chu Poy, 81 F. R., 826, Judge HAMMOND at pp. 827 to 828, strongly intimates that a merchant's clerk is not a laborer within the meaning of these statutes.

In the case of Wong Fong vs. U. S., 77 F. R., 168 (C. C. A.), the Court held that one conducting a gardening enterprise with Chinese labor in which his

work was supervisory only and in addition was a merchant, is not a laborer within the meaning of the Chinese Exclusion Laws, and here also the question came up again, which the Circuit Court of Appeals in the Second Circuit considered in the Pin Kwan case, as to proof requisite that business was conducted in defendant's name, it being held that the proof that the business was conducted in his name might be supplied indirectly and without production of the partnership articles or accounts, after their loss by fire, a situation almost precisely the same as here involved, which the Commissioner and Court below in these cases decided directly to the contrary. Moreover, the Circuit Court of Appeals in the Pin Kwan case overlooks the fact that the determination of the Circuit Court of Appeals for the Ninth Circuit, in the case of Lee Kan vs. U. S., 62 F. R., 914 (C. C. A.), to the effect that it would suffice if the defendant's name appeared as a partner in the firm books or articles, though the firm name itself was a fancy name, as nearly all Chinese mercantile establishments are conducted under such arbitrary names, has been acquiesced in by the executive officers of the Government ever since (23 Opinions, 485, and Treas. Department Pamphlet Instructions to Collectors and Others, Doc. No. 1849, promulgated April 7, 1896, by the Secretary of the Treasury, No. 22, p. 8): "The practice of officers of this Department will, therefore, conform to the decision of the case of Lee Kan, cited above." Nor has this Court ever disapproved of the opinion of the Attorney General (21 Opinions, 21), that this definition section of the Act of 1893 should not be construed retroactively against persons who were merchants resident in the United States before 1893.

In *In re* Ho King, 14 F. R., 724, the Court held that an actor was not to be regarded as a laborer.

All these cases are in line with the decision of this Court in the case of Laws vs. U. S., 163 U. S., 258, under the contract labor laws, to the effect that a chemist is not to be regarded as a laborer, notwithstanding the enumeration of the excepted classes under the contract labor laws, a decision which was applied and followed by the Circuit Court of Appeals in the Seventh Circuit in the case of U. S. vs. Gay, 95 F. R., 226, with respect to a draper and dry goods clerk. In those statutes, moreover, "laborer" is not limited to "manual" laborers, as in the Chinese Exclusion Acts. Nor have the opinions of the Attorney General on these points been as unreasonable and stringent as the contention now advanced by the Government indicates.

In an opinion handed down May 26th, 1897, reported at 20 Opinions, 602, the Attorney General ruled that a restaurant keeper not himself engaged in manual labor is not to be treated as a laborer, though, subsequently, after some decisions more or less to the contrary in District Courts, he held that a restaurant keeper who himself engaged in manual labor was to be classified as a laborer, but where he had left the United States in reliance upon the former classification, the Government authorities should permit him to re-enter (22 Op., 324).

In 23 Opinions, 485, the Attorney General ruled that one who was a cigar manufacturer as well as a merchant was not forbidden from re-entering, and in an opinion in 24 Opinions, 132, he held that the doctrine of the Lau Ow Bew case, 144 U. S., 47, concerning re-entry without a certificate of domiciled Chinese non-laborers, applies not only

to domiciled merchants, but to all other non-laborers domiciled here, of the classes enumerated in Article III of the Treaty.

In Treasury decision No. 17145, the Secretary of the Treasury, in May, 1896, ruled that a Chinese musician is not a laborer, forbidden to enter.

Moreover, the argument of Judge COXE in the District Court in the Pin Kwan case, 94 F. R., 824, reversed in the Circuit Court of Appeals, surely merits consideration.

It is accordingly submitted that the United States Commissioner in these cases erred in regarding the Pin Kwan decision concerning entry cases as controlling, and its determination that a particular person was not to be regarded as a merchant when proceeded against for unlawful entry, as authority for the proposition that such persons are to be treated as laborers required to register under the Acts of 1892 and 1893, and it is further submitted that persons in the position of these defendants who were, in the language of the Commissioner,

> "*engaged in business rather than in manual labor*"

should not be treated as manual laborers required to register in 1892, *because, long subsequent to that period their firm books and articles have been lost or carried away in consequence of the breaking up of their business, and that they are no longer able to produce those books or articles in order to prove by such primary instead of secondary evidence of their contents, that the business was conducted in their name and by such means that their interest was a real interest as partners.*

The Minor Cases.

The Commissioner further erred in ordering the deportation of two of these defendants, defendant Chu Do (case No. 308), now 26 years of age only, and the appellant, Lew Guey (case No. 309), now only 20 years of age.

The only charge against these men was that of non-registering, and it was never heretofore even contended on behalf of the Government that persons of such tender years as these defendants were in 1892 to 1894, having no occupation of their own, were or could be regarded as "laborers" by occupation, resident within the United States in 1892. It is an attempt to twist language, to treat boys of 9 and 15 years of age, as these defendants were when the Registration Law was first passed, as "laborers." This question seems to be directly contrary to the decision of this Court in the case of Mrs. Gue Lim against U. S., 176 U. S., 459, at pp. 466, 467, 468, decided at the October Term, 1899. That such was the view that prevailed at or about the time of such registration is further apparent also from the decision of the Court in *In re* Tung Yung, 19 F. R., 184, at p. 189, where the Court referred to the production of mercantile certificates by children between the ages of 10 and 15, sons or nephews of resident merchants, as an "absurdity," since they had no occupation of their own. The line of reasoning pursued by this Court in the Gue Lim case is also directly applicable to this question of registration, for here also as already shown by the regulations promulgated under the Act of 1893 (T. D. 14,542½), both the application for registration, the affidavit of the witness and the certificate itself were required to state applicant's "occupation;" this would be meaningless, and therefore inapplicable as to minors having no occupation of their own.

POINT IV.

The Commissioner erred in the Lew Guey case (No. 309) in excluding the certificate of United States Commissioner McGettrick to be found in the record (fol. 9) whose genuineness was admitted (fol. 25) and which was relied upon to show an adjudication made after due hearing on June 26th, 1897, by United States Commissioner McGettrick to the effect that the defendant was a citizen of the United States by birth (fol. 27).

This question is one of very great importance to hundreds of Chinese persons throughout the United States. It has been the practice until now for executive and judicial officers of the Government to treat this certificate as establishing the plea of *res adjudicata* with respect to the citizenship issue, upon proof that the holder of a genuine certificate is the person to whom the certificate was issued. Such practice was recognized in the instructions of the Treasury Department to its subordinates as late as October 30, 1900, in Treasury Decision No. 22,572. It was based upon principle and authority, and yet Commissioner Benedict in these cases refused to receive the certificate in evidence to establish such plea of *res adjudicata* (fol. 27), though its genuineness was conceded (fol. 25). His decision seems to have been based more upon the claim taken up in the brief of the Solicitor General and stated in the record (fol. 13), that it is either a certificate or a judgment, and that if it is a certificate, the Commissioner has no power to issue such paper, and if it is a judgment, it is not properly proved because neither certified nor exemplified.

That United States Commissioners have jurisdiction to determine the citizenship issue has been directly held by this Court in the case of Chin Bak Kan vs. U. S., 185 U. S., 193.

In hearing these cases, Commissioners do not sit merely as committing magistrates, but hear and determine these cases with the same jurisdiction and powers that a Justice of this Court would have, who has no greater power under the statute.

It is difficult to conceive of any reason why these determinations should not have the same force and effect as a basis for the plea of *res adjudicata*, as determinations in any other proceeding.

With respect to similar determinations under the Chinese Exclusion Laws upon *habeas corpus* proceedings, the Circuit Court of Appeals for the Ninth Circuit in the case of U. S. vs. Chung Shee, 76 F. R., 951 (aff'g 71 F. R., 277), has spoken in no uncertain words. The Circuit Court of Appeals said, at page 956:

> "It follows from this view of the effect of the Jung Ah Lung case that the decision of the District Court for the District of Oregon upon the writ of *habeas corpus* was an adjudication of the title of the defendant-in-error to be and remain in the United States, upon the facts which were involved upon the hearing of the writ. It is not claimed that she is amenable to deportation by reason of any fact arising since the date of that adjudication. The questions which were then determined were those which were raised by the petition and the return. In the petition was alleged the petitioner's claim or right to land, and the denial of that right, and her restraint. The judgment shows that upon hearing had she was 'discharged from the detention and restraint complained of in said petition.' It clearly appears that there were re-examined before the Court all the facts and circumstances which came before the collector on his

> original examination. She cannot again be lawfully arrested and held upon the same facts that were in issue in the former proceeding. (1 Freem. Judgm., Sec. 324; *Ex parte* Jilz, 64 Mo., 205; Yates' Case, 6 Johns, 337; *In re* Crow, 60 Wis., 349; 19 N. W., 713.) In the present proceedings, it is true, it is alleged that the adjudication of the Court in Oregon was obtained by the introduction of false testimony, and is tainted with fraud. But such fraud is not a ground upon which to collaterally attack the judgment. (U. S. v. Throckmorton, 98 U. S., 61.) We find no error in the decision of the District Court, and the same will be affirmed."

The unfounded and unproved assertions as to alleged irregularities in some of these cases could not be proved at all under the doctrine of U. S. vs. Throckmorton cited in this case and, of course, the assertion here, no proof of which was ever attempted below, is no evidence.

So also in U. S. vs. Luey Guey Auck, 115 F. R., 252, Judge WHEELER held that when one Commissioner has taken jurisdiction of one of these cases and made a final order therein, no other Commissioner can proceed *de novo* in new, independent proceedings. Compare the very recent decision of HAZEL, J., in U. S. vs. Hills, 124 F. R., 831, as to the propriety of entering orders in these Exclusion cases, however erroneous his ruling may be as to the competency of such decrees in evidence in criminal proceedings against the parties in view of the principles of Kirby vs. U. S., 174 U. S., 47, and Sparf vs. U. S., 156 U. S., 51, 56.

This Court has repeatedly had occasion to apply the principle of *res adjudicata*, saying,

> "that this general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and

repose of society by the settlement of matters capable of judicial determination."

Southern Pacific R. R. Co. vs. U. S., 168 U. S., 1, 48.
See also Coffee vs. U. S., 116 U. S., 436.

It is of course equally settled that this principle applies to determinations based upon jurisdiction, whether made in Courts of record or not of record.

Gates vs. Preston, 41 N. Y., 13.
Reich vs. Cochrane, 151 N. Y., 122.
Mohr vs. Maniere, 17 Fed. Cases No. 9695 (affd. 101 U. S., 416).

Nor has Congress failed to provide methods by which the Commissioner's determination upon such issues can be proved, though if there were no express provision on the point, the power to hear and determine would carry with it power to make an order which can be proved, and to certify to such determination.

U. S. vs. Jones, 134 U. S., 483.
Hoyne vs. U. S., 38 F. R., 542.
Philips vs. U. S., 33 F. R., 164.

We are, however, not left to mere implication on this matter, for the general exercise by Commissioners of the fair and proper issuance of certificates attesting their determinations in these cases is based upon express statutory provisions.

Section 847 of the Revised Statutes in its enumeration of powers conferred upon United States Commissioners for which they may charge fees, besides its specific enumeration, also recites that the Commissioner is entitled to compensation "for any other service, the same compensation as is allowed to clerks for like services." Clerks of the

Court under Section 828 of the Revised Statutes are authorized to charge

> "for entering any reported rule, *order*, continuance *judgment*, *decree* * * * or making any records, *certificate*, etc., for each folio 15c."

as also,

> "for a copy of any entry or record or of any paper on file for each folio 10c."

Under these provisions United States Commissioners have for many years past been constantly called upon to issue a large variety of certificates, and their power to do so has been repeatedly sustained both in this Court and below;

See

U. S. vs. McDermont, 140 U. S., 151.
U. S. vs. Julian, 162 U. S., 324,

concerning certificates by U. S. Commissioners, decided upon the authority of the statutes just referred.

This long established usage of commissioners in issuing such certificates has direct statutory authority therefore, to sustain it, and the technical objection taken by Chinese Inspector Izard for his own ulterior purposes should have been overruled, instead of sustained, by Commissioner Benedict. Moreover, this Court has repeatedly held that in proceedings before United States Commissioners, just as in matters pending before a Justice of the Peace, absolute technical accuracy is not to be expected nor insisted upon.

Southworth vs. U. S., 151 U. S., 179.

When we leave the question of law here involved for a consideration of the merits as to the issuance of such certificates in these cases, it is difficult to

conceive of any class of cases in which it is more important to establish a plea of *res adjudicata* by such certificates than this.

As was pointed out in one of the dissenting opinions in this Court, in the Fong Yue King case (149 U. S., 698, at p. 372), it is not even apparent that any compulsory authority exists for securing testimony in these Chinese Exclusion cases.

Where the issue is that of citizenship, death or removal of the few persons who are in a position to give direct primary evidence of birth in a particular place soon removes such proof, and there are few issues more difficult to establish than the question of citizenship. It is in view of this fact that the Courts have created an exception to the hearsay evidence rule, by allowing, on the theory of pedigree, hearsay evidence as to time and place of birth. Morever, the executive officers have so often and for such long periods erroneously impounded and destroyed certificates of Chinese laborers, merchants, and returning merchanrs on entry, under general regulation to that effect issued and subsequently revoked, that Commissioner's certificates are frequently the only certificates adducible for numerous Chinese persons (see Treasury Decisions, No. 8572, 11606, at pp. 1048, 14375, 14654 and 17237).

In this case, defendant himself testified that his father, who was a witness more than five years previously before Commissioner McGettrick, has since died (fol. 16).

Some criticism is made with respect to absence of photograph on the certificate. At the date when Commissioner McGettrick issued this certificate in 1897, it was not common to mount photographs upon certificates for the identification of the person to whom they were issued, though, subsequently, such practice grew up more generally. There is, of course, no provision in the

statute, or any rule of court, requiring photographs to be mounted upon the certificates, and while their absence makes it more difficult for defendants to give the requisite proof of identity with the person to whom the certificate was issued, such is the only effect of the absence of a photograph.

The commissioner has not based his decision upon any lack of proof of identity, but has bodily excluded the certificate and refrained from giving it any weight. It is not necessary to refer to the very strong proof found in this record, of the identity of the defendant with the person to whom Commissioner McGettrick issued this certificate. The record contains an admission that already before defendant was taken into custody, he produced this certificate (fol. 11). He was known by the same name as appears in this certificate, and the Government, without any alias, proceeds against him under such name.

Though possession and production of the certificate already at the time of the arrest, together with identity of names unrebutted, would be abundant proof of identity, defendant testified as to the facts as to his securing the certificate the dates tally, places tally, and in fact the Government made not the slightest attempt to contradict him.

Instead of there being a determination against the defendant on the *facts* here, it is apparent that the Commissioner erred *on the law*, in refusing to give the certificate the force and effect to which a due process of law entitles it, as proof of the plea of *res adjudicata*.

POINT V.

The Commissioner erred in the Yung Lee case, No. 312, in declining to make an order for the issuance of a registration certificate.

The Commissioner's opinion appears in the record herein (fol. 51) and is as follows:

> "In this case it is sought to be shown that the Chinese person named, who was a laborer, did not procure the certificate of residence from a collector of internal revenue as required by Sec. 6, of November 3, 1893, because he was unavoidably prevented from so doing by sickness until after the expiration of the time set by the statute within which such certificate might be given. It is established to my satisfaction and by a credible white witness that he was a resident in the United States on the 5th of May, 1892; but is not clearly established and to my satisfaction that he was unable through sickness *during all the time given by the statute* to obtain a certificate of residence. It follows that he must be found and adjudged to be unlawfully within the United States."

The defendant himself testified, as did also a white witness, Dennis O'Sullivan.

The Commissioner's finding expressly establishes the fact that said O'Sullivan is a "credible white witness," and it is by this witness that residence within the United States, on May 5, 1892, has been established. This witness' testimony carries proof of defendant's sickness down to September, 1893, on which date said witness changed his route and saw little of defendant thereafter.

It is obvious from the record that the Commissioner was misled by such arguments as the Circuit

Court of Appeals overruled in U. S. vs. Lee Seick, 100 F. R., 398, into the belief that the fact of illness preventing registration had to be established by white testimony, while the statute clearly requires only residence within the United States on May 5th, 1892, to be thus proved. In addition to this, however, the Commissioner was evidently misled as a matter of law, in construing the statute, as indicated by his finding, of failure clearly to prove inability to register "during all the time given by the statute."

Taken in connection with the recital immediately preceding this, of the date of May 5th, 1892, it appears that the Commissioner overlooked the fact that the Act of 1893 repealed in terms Sec. 6 of the Act of 1892, which had required registration under the prior statute, and discontinued all proceedings and repealed authority therefor, because of alleged violation of the former law of 1892.

Moreover, it would further appear that the Commissioner has attempted to give this statute an unduly harsh and severe construction, to the effect that there must not have been a day during the statutory period during which illness did not prevent registration. This is an unwarranted and oppressive construction of the statute, not sustained by the authorities.

U. S. vs. Tye, 70 F. R., 318.
In re Chin Ark Wing, 115 F. R., 412.
Wong Fong vs. U. S., 77 F. R., 168 (C. C. A.).

Moreover, Chinese persons are entitled to a liberal construction of this statute with respect to time, because the delay of the Government in the matter of prescribing regulations and forms of certificates required by this Act of 1893, until November 25th, 1893 (T. D., No. 14,542½), at once cur-

tailed by nearly a month, the opportunity which the statute was designed to give within which to register, for registration was unauthorized, until after the forms and blanks had been established and distributed. This defendant ought also, therefore, to have been discharged by the commissioner.

POINT VI.

The objections taken to the complaints herein to the effect that they state no cause of action and were insufficient to confer jurisdiction should have been sustained.

While this question is somewhat similar to the one urged and overruled by this Court in the case of Chin Bak Kan vs. U. S., 186 U. S., 193, still the very language of this Court on this point, as well as the particular facts involved, clearly distinguishes the application of the point to the different cases.

In the Chin Bak Kan case, as is specifically pointed out in the opinion of this Court, "no objection was raised to the complaint" below on the ground alone urged, that it was merely on information and belief. That was the sole ground of objection taken, and the question was presented in cases of alleged unlawful entry, where it was conceded at the time of arrest that defendants had just come into the United States (p. 194), while here defendants are shown to have resided here continuously for many years.

In the present cases besides, we find complaints for non-registration specifically attacked below, all of which fail to allege, even on information and belief, the essential elements (*a*) that defendant was

a Chinese laborer, and (*b*) resided within the United States on May 5th, 1892; and moreover, the charge merely was that these defendants did not obtain a certificate from the Collector of Internal Revenue for the First Collection District, in which they were arrested, but which was not the city of their residence in 1893–4, as shown by the record, at the time registration was necessary.

As already shown in the cases hereinbefore collected, both under this law and under Article IV of the Treaty of 1894, it is clear that only Chinese persons who were laborers within the United States in 1894 were required to register, and they could register only during the limited period granted by the statute. Citizens of the United States by birth, it is well established, were not required to register, though of Chinese extraction. Non-laborers were not required to register. Minors were not required to register. Chinese persons who have since lawfully entered the United States and subsequently *bona fide* became laborers, are here lawfully without certificates. Accordingly, a large number of persons may be found within the United States to-day lawfully without certificates of registration because of mere lapse of time, and in all cases in which any of these persons were exempt from registration, when registration was required, have since become laborers, they would be lawfully within the United States without registration certificates.

The essential charge that defendants were of the prohibited classes required to register in 1892–4, but failing to do so, is not made.

Moreover, as already argued hereinbefore, the Treaty of 1894, the Act of 1901 referred to in the Chin Bak Kan case and the later statute of 1902, subordinating all these statutes to the treaty, have had the effect of making it error for the Govern-

ment to proceed upon such imperfect complaints as these.

While it is true that at the time the Geary Law was passed in 1892, Chinese laborers who neglected to register could be arrested without complaints under oath, that is no longer so under the subsequent amendatory statutes and treaty concerning this very matter of complaints under oath; to those already cited may be added Section 13 of the Act of 1888, which expressly requires complaints under oath, and which statute is in terms continued or enacted by the Act of 1902.

Accordingly, the general line of authority requiring complaints setting forth the facts establishing causes of action, is applicable here.

> Rice vs. Ames, 180 U. S., 371, 374.
> *Ex parte* Hart, 63 F. R., 249, 259 (C.C.A.).
> *Ex parte* Lane, 6 F. R., 34, 38 (Mr. Justice BROWN).
> U. S. vs. Tureaud, 20 F. R., 621.
> U. S. vs. Sapinkow, 90 F. R., 654, 660.
> West vs. Cabell, 153 U. S., 78.

Moreover, even before complaints under oath were requisite, the statute contemplated prior investigation by the arresting officer. For instance, the statute authorized the arrest only of Chinese *laborers* having no certificate, and inasmuch as proof on the question as to whether they are laborers or not, is not thrown by Section 6 of the Act of 1893 upon the defendants, such fact must be made to appear by the efforts of the Government; as, for instance, by such stipulation as was here made, that defendants were arrested working in laundries. That arrests without investigation even where sworn complaints were not necessary, are not authorized in these cases, was clearly ex-

pressed by the Circuit Court of Appeals for the Second Circuit in the case of

Reisterer vs. Lee Lum, 94 F. R., 343, at p. 346 (C. C. A.),

where the Court said, with respect to an arrest of an alleged unregistered laborer, after stating at that time that a warrant was unnecessary to justify arrest,

> "nor so far as appears did he (the Chinese Inspector), make the slightest effort to get information about the antecedents of the plaintiff. We cannot doubt that the case justified the conclusion that the defendant acted hastily and overzealously in making the arrest and allowed his suspicion to overmaster the discretion and judgment which he ought to have exercised."

Accordingly, a verdict against the Inspector for malicious prosecution was affirmed.

Moreover, in view of the statutory provision concerning complaints under oath found in Section 13 of the act of September 13, 1888, and in the Act of 1901, the language of this Court in Southworth vs. U. S., 161 U. S., 639, at p. 642, also becomes applicable as to the investigation requisite on the part of a United States Commissioner before issuing a warrant of arrest,

> "It carries, also, the further thought that in a discharge of his judicial functions, the magistrate exercises a personal and judicial consideration of every charge made, and subjects no one to the annoyance and disgrace of an arrest until, after personal and careful investigation, he, as a magistrate, believes him to be guilty of a violation of a law. The idea of perfunctory discharge of these duties, of a transfer of responsibility to mere clerks, of a wholesale proceeding against a multitude of

> citizens without personal inquiry as to the probability of the charge against each, is *something abhorrent to the true and* reasonable understanding of the conditions of judicial action."

It is submitted that the statutes and treaty subsequent to the Act of 1892, requiring warrants to be based upon complaints under oath—which the Government recognized by instituting the proceedings upon complaints—has had the effect of modifying the earlier provisions, at least to this extent, that a complaint stating facts at least upon information and belief is necessary before this oppressive reversal of burden of proof can be invoked by the Government, just as in revenue forfeiture cases the Government must establish probable cause, before the burden of proof shifts upon the claimant under Rev. St., Sec. 909. Nothing else can prevent these statutes from being used as an agency to work inexpressible oppression, extortion and blackmail, particularly against Chinese resident merchants.

POINT VII.

These proceedings were all barred by the Statute of Limitations of five years, since more than five years have elapsed since registration was authorized and the defendants were shown to have been continuously resident within the United States for upwards of five years, and in fact, upwards of 20 years with respect to each defendant except Lew Guey, the holder of the McGettrick certificate.

Even if these proceedings are not criminal, they are at least *quasi* criminal within the meaning of Section 1047 of the Revised Statutes, which reads as follows:

> "Sec. 1047. No suit or prosecution for any *penalty or forfeiture, pecuniary or otherwise*, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued. *Provided*, That the person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

It is, of course, well settled that numerous classes of cases, such as actions for penalties, under the copyright laws, customs laws, contract labor laws, etc., though not strictly criminal, are still *quasi* criminal within the meaning of such provision.

Boyd vs. U. S., 116 U. S., 616.
Lees vs. U. S., 150 U. S., 476.
Johnson vs. Donaldson, 3 F. R., 22, Wallace, J.
Daly vs. Brady, 69 F. R., 285.
Bolles vs. Outing Co., 175 U. S., 262.
U. S. vs. Riley, 88 F. R., 480.

While these Chinese Exclusion cases are not to be reviewed as criminal proceedings, they partake so far of the nature of criminal proceedings as to be governed by these provisions, applicable to proceedings for penalties and forfeitures.

Ex parte Sing, 82 F. R., 22 (Coxe, J.);
U. S. vs. Wong Quong Wong, 94 F. R., 832 (Wheeler, J.);

U.S. vs. Jacobus (C.C.A.), 2d Circuit, unreported, holding that marshal's fees in Chinese Exclusion cases are embraced by the statutory provision concerning criminal cases; also group of cases decided by Wing, J., in the United States District Court at Cleveland, in October, 1903, holding in line with Ex p Sing *supra.*, that they are so far *quasi* criminal, that the Chinese defendants cannot be compelled to testify against themselves. In fact, when the language of the section here in question (1047) is perused, it is difficult to see what Congress could have intended by the words "penalty or forfeiture, pecuniary *or otherwise*," if such cases as these, arising under the Chinese Exclusion laws are not thereby embraced.

In every other case known to our law, Statutes of Limitations have been established, and it is difficult to conceive of any reason why these statutes should be construed as excepting this line of cases. In fact, they seem more called for as to non-regis-

tration charges than in any other class of cases known to the law, because by lawful means, as mere lapse of time, the number of cases of Chinese persons lawfully unprovided with certificates, is constantly increasing. Holders of certificates also grow day by day different in appearance than they did when the certificates were issued in 1894, and the charges are all based upon presence without a certificate which should have been obtained in 1894. Clearly, with all the vigilance exercised by the Government at its command, five years were ample time to remove persons claimed to have failed to perform this statutory duty, though, as already indicated, the number of such culprits must necessarily have been extremely small after November, 1893, from the very start. But the argument of the Solicitor General is directed more to the point that these are supposed to be "continuing offences," and so the statute has not yet run, he claims. This overlooks the fact that even with respect to so-called "continuing offences," this Court has overthrown the theory that the Statute of Limitations can be thus circumvented, and has held instead that the statute begins to run as soon as the offence is complete, even with respect to continuing acts like "withholding pension moneys and the anti-polygamy laws."

U. S. vs. Irvine, 98 U. S., 450.
Re Nielson, 131 U. S., 126, 187.

In fact, however, an analysis of the statute makes it clear that these cases do not involve any question of "continuing offenses" because registration was required, during the six months after November 3d, 1893, and forbidden subsequent thereto, so that the charge of non-registration was complete on the last day of the six months follow-

ing November 3d, 1893. It must surely be true that the provisions of the Chinese Exclusion Laws establishing judicial proceedings must be read in connection with some of the general statutes and laws of the United States like the rules of evidence, and as to procedure like the Statute of Limitations (*In re* Chow Goo Pooi, 25 F. R., 78, 80, 81, Sawyer, Hoffman and Sabin, J. J., and *in re* Ah Quan, 21 F. R., 182, 186, *Third*). Even as to rights created by Federal Law, such as patents, this Court has by implication found State Statutes of Limitations to govern, rather than to leave a class of cases outside all limitations (Campbell vs. Haverhill, 155 U. S., 610).

It is submitted that it is difficult to conceive of any class of cases in which there is more cause for invoking the Statutes of Limitations than these charges of non-registration, brought now so many years after the alleged acts were committed, and when, as here shown, the case may be made to turn upon the production of original firm books and articles of mercantile firms dissolved many years ago, but to which defendants belonged at the time of the passage of the Registration laws.

Of course, charges of unlawful entry stand upon a different basis, and the statutory period contended for does not begin to run until the entry has been effected, which date, of course, varies with each case.

It is no unimportant point for consideration in connection with these cases that until Chinese Inspector Izard's inquisition proceedings began no wholesale raids for alleged violation of Chinese registration provisions had been brought anywhere within the eastern half of the United States, in any event since the five year Statute of Limitations period herein contended for, expired, following the passage of the Registration Law of 1893.

POINT VIII.

The orders appealed from should be reversed and defendants discharged.

Respectfully submitted,

MAX J. KOHLER,
Of Counsel.